Cott Beverages Inc. *and* Joseph Kelly. Case 16–CA–181144

February 27, 2019

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On September 12, 2017, Administrative Law Judge Paul Bogas issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a cross-exception, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

This case involves a complaint allegation that the Respondent's work rules prohibiting employees from having cell phones on the manufacturing floor or at their workstations violate Section 8(a)(1) of the National Labor Relations Act based, at least in part, on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647. The Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *Boeing Co.*, 365 NLRB No. 154, slip op. at 16–19 (2017). Accordingly, we sever and retain this complaint allegation, and we issue below a notice to show cause why it should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.[2]

ORDER

The Respondent, Cott Beverages Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in San Antonio, Texas, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Further, NOTICE IS GIVEN that any party seeking to show cause why the complaint allegations regarding the Respondent's work rules and policies should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before March 13, 2019 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C. February 27, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating employees about their protected concerted activities.

[2] We shall modify the judge's recommended Order consistent with this decision and the Board's standard remedial language and substitute a new notice to conform to the Order as modified.

In their response to the notice to show cause, the parties may address the General Counsel's cross-exception to the judge's failure to require a nationwide notice posting to remedy the work-rule allegations. The General Counsel made no argument to support his contention that a nationwide notice posting was necessary to remedy the unlawful interrogations. Accordingly, we decline to order such a remedy here.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor laws and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COTT BEVERAGES INC.

The Board's decision can be found at www.nlrb.gov/case/16-CA-181144 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Eva Shih, Esq., for the General Counsel.

Brian Stolzenbach, Esq. and *Karla E. Sanchez, Esq. (Seyfarth Shaw LLP),* of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in San Antonio, Texas, on May 24, 2017. Joseph Kelly, an individual charging party, filed the charge on July 29, 2016, and the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued the complaint on February 27, 2017. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by coercively interrogating employees about their concerted activities on May 13, 16, and 17, 2017, and also by maintaining overly-broad rules prohibiting employees from having cell phones on the manufacturing floor or at their workstations. The Respondent filed a timely answer in which it denied committing any violation of the Act. By Order dated May 24, 2017, the Board unanimously denied the Respondent's motion for partial summary judgment seeking dismissal of the complaint allegation regarding the Respondent's cell phone policy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a beverage manufacturing facility in San Antonio, Texas, where it annually receives products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Texas. The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Respondent is a beverage manufacturing company that operates 15 facilities, including one in San Antonio, Texas. It produces and packages carbonated soft drinks, juices, and purified water. The Respondent employs 190 individuals at its San Antonio facility, of whom about 50 work in production and 15 in the warehouse. The Respondent's employees are not represented by a labor organization.

The Respondent produces beverages at the facility by combining various raw materials with treated water. There are four production lines at the San Antonio facility, each of which produces beverages or containers and/or fills containers with beverages. The lines operate continuously during the shifts when they are in operation, with four to six employees on each line during a given shift. (Tr.) 139.) Employees assigned to the production lines do not have scheduled breaks, but they do have unscheduled breaks, including 30 minutes for lunch. Each production line has a lead employee, referred to as a "line lead," who oversees the operation of the line. When an employee working on the line takes a break it is generally the line lead who relieves that employee and steps in to perform the relieved employee's duties. The noise level on the production floor is generally quite high. Much of the work is fast-paced, but particular employees are assigned to equipment that operates very slowly. In addition to the production floor, the facility has a 350,000 square foot warehouse area where raw materials and product are stored. Five employees work in the warehouse on any given shift. Forklifts are used in both the production and the warehouse areas at the facility to move materials and product.

Darren Heinsohn is the process leader for one of the four production lines at the facility. In that capacity, he oversees the line lead employee as well as the regular employees on that production line. Heinsohn reports to Shane Owens who is the facility's production manager. Brian Vanley is the human resources

manager at the facility.[1]

2. Ammonia leak accident on May 12

On Thursday, May 12, during second shift—which runs from 2 to 10 p.m.—there was an emergency involving a leak of anhydrous ammonia into the air at the facility. The record does not show how dangerous the employees' exposure to this substance was from a medical perspective but does show that the experience was traumatic for many of the exposed employees. Some employees were placed in ambulances or otherwise provided with first aid. Exposed employees experienced coughing, trouble breathing, and burning of their eyes and noses. At approximately 8:30 or 9 p.m., after all the employees had evacuated the affected area, the Respondent sent the employees home. The record shows that, even by the Respondent's own lights, the evacuation of employees from the affected area was very poorly executed.

Joseph Kelly is the charging party and a production line employee who is also a member of the facility's safety committee. He was the first employee to react to the May 12 ammonia leak. When he smelled the ammonia entering his work area he informed a line lead and also used the Respondent's radio system to warn others to evacuate. He made a phone call about the incident to public safety officials using the 911 system. Later that day, Kelly discussed the incident with Joseph Carey, a human resources coordinator. Carey told Kelly that he had responded appropriately to the ammonia leak, and also asked Kelly to visit him the next day and provide a written account of what had happened. Kelly testified that for several weeks prior to this incident he had smelled ammonia at the facility and had reported it to the Respondent in his capacity as a member of the safety committee.

3. May 13: employee petition, suspension of Kelly, interrogations by Heinsohn

After the second-shift employees were evacuated, the Respondent repaired the ammonia leak and deemed it safe for employees to return to the facility. By the time second-shift employees were scheduled to begin their May 13 shift, the facility had been back in operation for some time. When the employees assigned to the second shift appeared for work, a number approached Kelly—safety committee delegate—and indicated that they were upset and scared as a result of the May 12 leak and were looking to Kelly to help ensure their safety. Those who approached Kelly to express concerns included production line employees Kirk Dudley and Laura Maltarich. During the shift meeting with a supervisor and a line lead, employees sought assurances and information from the Respondent regarding their safety and about the ammonia leak. However, the supervisor and line lead stated that they had not been present for the accident and could not answer questions about it.

About an hour into the May 13 shift, the line lead relieved Kelly for the purpose of allowing Kelly to visit the human resources department and provide the written statement that Carey had requested a day earlier. After being relieved, Kelly did not immediately proceed to the meeting with Carey but took a number of minutes to draft a petition asking the Respondent to meet with employees to provide information about the ammonia leak. Then Kelly approached employees who were at their workstations, stated that "we're trying to get a meeting" about the ammonia accident, and offered employees the opportunity the sign the petition. Kelly approached these employees while they were on work time, but according to Kelly's unrebutted testimony he only approached employees who "weren't immediately in the middle of something." The petition read as follows:

> We respectfully request a meeting with management by 6:00 pm, 13 May 2016, in order to discuss yesterday's incident with anhydrous ammonia. So far, no one from management has spoken with us as a group so that we all might learn
> - what actually happened
> - what went well
> - what failed
> - how we all are going to prevent similar incidents and failures.

Eight employees, including Kelly, signed the petition.

After obtaining the signatures, Kelly proceeded to the human resources department for the meeting with Carey. Before turning to the planned subject of that meeting, Kelly presented the signed petition to Carey and stated that employees were "very freaked out" and wanted to have a meeting. Then, as had been requested by Carey, Kelly prepared a written account regarding the May 12 ammonia emergency. After he provided that written account to Carey, Kelly left the human resources department and returned to the production floor. Before resuming his duties, Kelly stopped to converse with each of the persons who had signed the petition. The subject of these discussions was the possibility that employees would collectively engage in a work stoppage or slowdown if the Respondent did not meet with them as requested in the petition. Dudley, one of the individuals who signed the petition, told Kelly that he would not risk his job by engaging in a work stoppage. After this conversation with Kelly, Dudley reported to a line lead that employees were talking about a possible work stoppage. That line lead called process leader Heinsohn, who was not at the facility. He told Heinsohn that Kelly "was out there talking to the employees with a document, about having them sign a document about stopping work." Heinsohn reacted by calling his own supervisor—production manager Owens—to alert him. Owens directed Heinsohn to go to the facility and eject Kelly from the building. Heinsohn went to the facility, told Kelly that he was being suspended for "disrupting production," confiscated Kelly's badge and keys, and escorted him out of the facility. Heinsohn did not question Kelly.

Heinsohn testified that his job responsibilities did not include conducting investigations into possible violations of the Respondent's policies and procedures. Nevertheless, after ejecting Kelly from the facility, he summoned four of the petition's signers—Anthony Arellano, Dudley, Sonia Lopez, and Maltarich—to an office, questioned them, and directed each to prepare a statement. The record shows that Heinsohn was the supervisor of these employees, although there was a line lead employee who oversaw their work more directly. According to Heinsohn's own written account of the interviews, what he questioned the

[1] The Respondent admits that Heinsohn and Vanley are agents of the Respondent. (GC Exh.1(f).)

employees about was the discussions they had had regarding a work stoppage, not about whether employees were on break time or worktime when the petition was passed around. (GC Exh. 18.) In his report, Heinsohn reported that he asked each of the employees to "give a statement for how the work stoppage discussion was started, whom and what if any details." Ibid. Heinsohn placed each of these individuals alone in an office and waited for him or her to finish writing the statement. Maltarich declined to provide a statement, explaining to Heinsohn that she did not want to get anyone "in trouble." In addition, Maltarich refused Heinsohn's direction to return to work, stating that she was afraid to do so because she had not been sufficiently reassured about safety relative to the ammonia leak. Based on this refusal, Heinsohn suspended Maltarich, and on May 20 the Respondent issued a written warning that references the purpose of the Heinsohn interview being to "discuss the events of an earlier issue where a work stoppage was called for." (GC Exh. 14.) The other three employees provided written statements. Dudley, the employee who had informed the Respondent that employees were discussing a work stoppage, testified that during the interactions with Heinsohn on May 13, he "felt very comfortable," under no "pressure," and did not believe he was in trouble. The written statement that Dudley provided to Heinsohn ends by stating: "I immediately told my line lead . . . about what was going on. I really like working here and would not do anything to jeopardize that. Thank you."

Later that day, Heinsohn contacted Vanley by phone to communicate with him about the suspension of Kelly and his questioning of employees who had signed the petition. Vanley testified that what Heinsohn told him was "that there was a potential work stoppage and a petition that had been filed or run around." Vanley did not testify that Heinsohn told him whether the employees were on break time or work time when they took part in these activities. Heinsohn informed Vanley that he had already suspended Kelly and taken statements from three employees. He also stated that he had tried to obtain a statement from Maltarich but that she had refused and that he had sent her home. Vanley did not direct Heinsohn to perform any investigation of the matter but did tell Heinsohn to bring the employee statements when the two met on Monday, May 16.

4. May 16 and 17: Interrogations by Vanley

On May 16 and 17, Vanley conducted his own interviews of seven of the employees who had signed the May 13 employee petition. These included the four employees who Heinsohn had already questioned. At trial, Vanley testified that that he was investigating whether Kelly had violated the Respondent's solicitation policy by approaching employees during working time.[2] On May 16 he interviewed five of the employees—Arellano, Dudley, Armando Gomez, Lopez and Alva Rios. Vanley had had occasion to speak to all of these individuals prior to the incidents at issue here. The next day, May 17, Vanley interviewed the petition's creator, Kelly, as well as Maltarich.[3] Vanley testified that he did not interview the remaining petition signer, Christopher White, because White was a temporary employee. Vanley did not further explain why White's status as a temporary employee would mean that his account would not be relevant to the purported subject of Vanley's investigation—i.e., whether Kelly had solicited other employees during working time. He also did not testify about his reasons for not obtaining statements from employees who, while they did not participate in the petition, were in a position to tell him whether Kelly had approached them, or nearby employees, during working time.

Regarding the manner in which he questioned witnesses on May 16, Vanley testified as follows: "I actually came and asked them if they were approached during work time, or pretty much what happened and what—opened the question, 'what happened,' and during what time and when it happened, and I left it at that for them to fill in the blank on that one." (Tr. 40–41.) After the questioning, Vanley presented each interviewee with a typed statement that he had prepared for them and allowed them the opportunity to review the statement and to make changes before signing it. Four of the five accounts included the identical statement: "To my knowledge, Joseph [Kelly] was not on break when he made this request," i.e., the request to sign the petition. One of the statements, the one that Rios signed, was slightly different, reading "To my knowledge, I do not know whether Joseph [Kelly] was on break when he made this request." (GC Exhs. 9 through 13.) In addition, each of the five addressed the question of the work stoppage issue. Arellano, Gomez, Rios, each stated that they had not been approached about a work stoppage, and Lopez stated that she did not "participate" in a work stoppage. The sworn testimony shows that these individuals had, in fact, been approached by Kelly about the possibility of collectively stopping work. For his part, Dudley testified that when Kelly raised the issue of a work stoppage with him, he "[i]mmediately went to my team lead . . . and told him what was happening."

On May 17, Vanley interviewed Kelly. The interview took place in Kelly's office, and was also attended by Ewing Bond, the process leader for the production line on which Kelly worked. Kelly recorded the interview, and the parties subsequently reached agreement on the accuracy of a written transcript of the entire interview.[4] Vanley began the interrogation by

[2] The Respondent's "solicitation and distribution of literature policy" provides in relevant part: "Solicitation of any kind by one associate of another associate is prohibited while either person is on working time. Working time is defined as times when the associate solicited and the associate doing the soliciting are expected to be performing work functions." (R Exh. 5), section 2.0. The policy defines "solicitation" as "[t]he act of obtaining orders for merchandise or business, appeals for contributions to outside organizations, petitioning, or distribution of materials or programs that are not work related." Id. at section 4.0.

[3] Vanley testified that the May 7 interview with Maltarich focused on an unrelated matter. The General Counsel did not present any evidence that specifically contradicted Vanley's testimony on this point.

[4] On June 6, 2017, the counsel for the General Counsel submitted a transcript of the May 17 interview to me, represented that the parties had agreed to its accuracy, and requested that I receive the transcript as Administrative Law Judge Exhibit Number (ALJ Exh. 1). This submission was served on the other parties and no opposition has been received. I have ordered that the stipulated transcript be made part of the record as ALJ Exh. 1. The transcript is 20 pages long, and while the entire

asking "From your perspective, what happened Friday?" Kelly answered that after the ammonia leak many employees came to him in his capacity as a part of the safety committee asking him to "take care of this" and asking for "somebody to come and tell them what was going on." Vanley asked Kelly why he thought "a petition was the best way to try to get management to talk to you," and asked why he did not use the Respondent's preferred method for addressing safety concerns about which Vanley said that Kelly had previously received a "documented coaching." Kelly stated that employees had attempted to obtain information from the Respondent prior to preparing the petition. Vanley pressed Kelly regarding those efforts and asked again "why the petition?"

Then Vanley asked Kelly when it was that he had obtained signatures on the petition. Kelly confirmed that he created and circulated the petition as "part of that time off" that he had been granted to visit Carey and provide a statement about the May 12 ammonia leak incident. He stated that after he met with Carey and gave him the petition and the requested statement, he reported to the signers what Carey had said and had discussions with them about the possibility of a collective work stoppage. Vanley asked Kelly to reveal who had first raised the idea of a work stoppage and Kelly responded, "I am not going to tell you who was talking about collective action."

Kelly indicated that he was concerned about safety in part because the ammonia detector and refrigerator alarm had not "went off" when the leak occurred. Vanley questioned why, if persons had felt unsafe, they waited to raise it in a petition during the shift, rather than "express that at the very beginning of the shift during the meeting." Kelly said that given the facility's emphasis on "keeping that line running," it would take "strength to stand up against that and say, 'I'm scared,'" and that most employees "don't know that it's—it's their right that they don't have . . . to tolerate dangerous things." Then Vanley again criticized Kelly's decision to raise the safety issue by way of the employee petition. He complained that Kelly had repeatedly failed to handle safety concerns in the manner preferred by the Respondent, and asked Kelly "What will it take for you to understand that? What are we not communicating clearly to you?" Kelly stated that he had "acted within my rights." Vanley responded: "How do you figure that? Yeah. You know you broke Company policy when you did this. That's why I'm suspending you."

Later in the interrogation, Vanley returned to the subject of Kelly's decision to raise the concerns in a collective petition, asking Kelly "what part of the communication process do people not understand, or you?" Kelly said that people followed the communication processes, but "it doesn't work," and people were wondering "why aren't we heard? . . . what is it going to take." Vanley again asked Kelly why he felt that "this particular action," i.e., the petition, was called for rather than individually going up the chain of command. Kelly answered that he had used the petition "[b]ecause my co-workers asked me . . . to represent their concerns to management." Kelly opined that more disruption was being caused by the Respondent questioning people and throwing people off the property than by the submission of a petition stating that employees wanted a meeting to address their safety concerns. Once again Vanley stated his concern was with the method, i.e., that Kelly had used a petition to raise the safety concerns rather than following the process that the Respondent had described to him. "I'm just curious," Vanley said again, "why you just can't follow the process." Kelly stated that at the shift meeting the available supervisors declined to respond to employee concerns. Kelly stated that by taking the matter to the human resources department he had "gone up the chain of command," but Vanley stated that Carey was "not in the chain of command."

In the last moments of the meeting, Vanley, for the first time during the interview, asserted that Kelly had been soliciting other employees on "company time." Vanley stated that "you felt like you had the right to do this, but you still violated Company policy." Kelly opined that the solicitation policy was unlawful, and Vanley responded: "No, it's not . . . . [Y]ou keep quoting law. I wonder where you're getting your information because I had a conversation with corporate legal today, and the employment attorney for us and they don't see it that way."[5] The Respondent terminated Kelly's employment shortly after this meeting, but there is no allegation in this case that the termination was unlawful.

Based on my review of the record, I find that, contrary to Vanley's testimony, the subject of his questioning of Kelly and the other employees who signed the petition was not to determine whether Kelly had solicited employees during working time in violation of company policy, but rather to flush out information about the work stoppage discussions, including the identities of the employee or employees who started those discussions or expressed support for them. There was never any dispute that Kelly had approached employees with the petition during their working time. Three employees had already divulged this in response to Heinsohn's questioning on May 13 and the Respondent does not claim there was any contrary information. Therefore, Vanley's claim that on May 16 and 17, he had to interview six of the persons who signed the petition in order to determine whether Kelly had solicited them for those signatures during working time is simply not credible. In addition, the record provides a reasonable basis for inferring that one purpose of Vanley's interviews was to intimidate the employees who had signed the petition. Specifically, I note that employees who had not themselves signed the petition would still have had information about whether Kelly approached them, and perhaps others stationed

recording lasts 39 minutes, the portion of the recording that constitutes Vanley's interview of Kelly lasts approximately 29 minutes.

[5] Vanley subsequently prepared an investigation summary, dated May 18, in which he discussed his May 17 questioning of Kelly. Vanley's account in that document is less than candid insofar as he describes the focus of his questioning as being Kelly's collection of signatures during working time. See GC Exh. 19. The stipulated transcript of the interview makes it abundantly clear that the focus of Vanley's questioning and criticism was Kelly's decision to use a petition, rather than the Respondent's preferred avenues for bringing concerns to management's attention. In addition, Vanley sought to discover who had first raised the idea of using the group petition approach to express employees' safety concerns. Indeed, I find that by the time he interviewed Kelly, Vanley had already determined that Kelly solicited signatures from employees who were on work time.

nearby, during working time, but Vanley did not interview any of those employees. The only witnesses who Vanley subjected to being pulled off the production floor and summoned to his office for questioning where those who had themselves engaged in concerted activity by signing the petition. I also note that Vanley subjected every one of the signers to this treatment with the exception of White, who was the one temporary employee who signed. However, if Vanley's purpose had really been to find out if Kelly approached employees during worktime, the testimony of this temporary employee would have been just as valuable as that of the six permanent employees who signed the petition and who the Respondent did interview. If, however, Vanley's purpose was to intimidate or purge employees who were inclined to engage in concerted activity, that would explain why Vanley did not feel it was important to interrogate a signer whose tenure at the facility was already temporary.

5. Prohibition on cell phones

The General Counsel alleges that the Respondent's policies prohibiting employees from having personal cell phones in the facility's production and warehousing areas or at their workstations unlawfully interferes with employees' right to engage in protected concerted activity. There are two statements of policy at issue—one a corporate-wide policy and one promulgated for the San Antonio facility. The "cleanliness" section of the corporate policy, which has been in effect since approximately March 25, 2014, states:

> 4. All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment, or containers must be removed. (Stoneless wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas.) (Medical Alert Bracelets are not permitted.) Medical emergency I.D. needs, must be reported to HR.
>
> 5. Items are not to be kept in shirt pockets or in any location above the waist that would allow them to fall into the product, food contact surface, or food packaging materials. No personal cell phones are permitted on the manufacturing floor except for those which are company issued or approved. Cellular communication devices may be maintained on the person for management and leadership roles. Radios and company provided communication devices are to be used as the primary form of communication in the manufacturing area. Clothing and personal belongs, such as cigarettes, purses, newspapers, magazines, medications, and personal cell phones are not to be kept at the workstation. These items are to be stored in lockers or in your personal vehicle. No personal portable electronic equipment i.e. MP3 players, IPODS, pocket pagers, portable games etc. are allowed in manufacturing, processing, or warehousing areas.

(GC Exh. 3.)

At the San Antonio facility the Respondent has promulgated the following prohibition, which has been in effect since approximately April 2015:

> PERSONAL BELONGINGS:
>
> Personal items (items not directly related to production processes or job requirements) are not allowed in work areas. These include, but are not limited to: clothing, cell phones, MP3 players, gaming devices, cigarettes, purses, magazines, medications, newspapers, etc. These may be kept in an associate's locker and may be used during break periods in designated areas.
>
> JEWELRY:
>
> All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment or containers must be removed (plain wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas).
>
> NO ITEMS ABOVE THE WAIST:
>
> No items may be carried in shirt pockets (i.e. pens, pencil[s], combs, etc.) All loose items must be carried in pants pockets or otherwise secured below the waist; such items should be minimized. Plants providing uniforms are encouraged to purchase shirts with no pockets, to help enforce this policy.

(GC Exh. 4.)

Patrick Rank was the Respondent's corporate senior director of quality from October 2013 to May 2017, and during that period he headed a team that developed the "good manufacturing practices" policies that contain the prohibitions set forth above. He testified that there were two basic reasons for the Respondent's promulgation of the prohibitions on personal cell phones and electronic devices. The first was to protect against contamination. In particular, he stated that "hav[ing] a cell phone or something above the belt would allow a foreign material to be dropped in a container" used in the production of food. (Tr. 146.) He indicated that such foreign material could include the device itself. (Tr. 147–148.) Rank testified, and the General Counsel does not dispute, that all of the Respondent's plants are regulated by the U.S. Food and Drug Administration (FDA) pursuant to the Food, Drug, and Cosmetic Act (FDCA). See 21 U.S.C. Section 301, et seq.; 21 C.P.R Section 110.5, et seq.

Rank testified that the second reason for the prohibition was that the Respondent was concerned about the safety of its employees. (Tr. 146.) Employees' use of cell phones near the production lines, he stated, could distract employees and slow their reaction to problems or cause them to injure themselves. He stated that use of the cell phones in the warehouse might distract employees and cause someone, or something, to be hit by a forklift.[6] Neither Rank's testimony, nor the record as a whole, identifies any actual incidents when an employee's possession of a

[6] The Respondent's counsel asked Rank about chemicals used at the Respondent's facilities, and Rank responded that cleaning chemicals used at the Respondent's facilities could be dangerous if used improperly. Rank did not, however, claim that the presence of cell phones or other electronic devices increased the risk that chemicals would be used improperly or that the risk involving cleaning chemicals had anything to do with the prohibitions at issue here.

cell phone or similar device resulted in product being contaminated or in injury to a person or property.

Rank was asked by counsel for the Respondent whether it would be possible to address concerns about cell phones in a less restrictive manner – for example, by allowing employees to possess cell phones but restricting how they carried and used them. Rank's testimony till that point had been largely fluid, but in response to this softball question from sympathetic counsel his speech became hesitant and stammering. His uncertainty was apparent to me from his demeanor, but it is evident even from a simple review of the transcript of his answer:

> No. No. I don't—I think if you—if you try to implement a policy such as the one you just recommended or not recommended, but just suggested, it is one that—I don't see how a—I don't see how it could be managed. It is not a policy that—you don't—you would then be in a position to have to manage the—every single minute of what an associate was doing with that particular device, so I don't think the policy in itself would be manageable.

Tr. 150–151. Not only was Rank's response on this subject strained and uncertain, but it was also self-serving and conclusory. I find that this response was not credible and give it no weight.

Rank stated that while the contamination and safety concerns discussed above justified prohibiting employees from even possessing cell phones in the production and warehouse areas, the Respondent permitted line lead employees to possess *and use* cell phones in those same areas.[7] He stated that the Respondent did not apply the prohibition to lead employees and managers because those individuals "have a responsibility to communicate . . . to the outside world or to the management" about occurrences at the manufacturing facility. Rank also expressed the view that because supervisors are "not tied to a piece of equipment" Tr. 149, the Respondent did not, by allowing those individuals to possess and use cell phones, create the same risk that it would by allowing regular employees to exercise that freedom. It appears, however, that Rank, who was a corporate-level official, did not have an accurate understanding of the role that lead employees played at the San Antonio facility. In particular the evidence showed that, at the San Antonio facility, line lead employees were generally the ones who took over other employees' production line duties during breaks. (Tr. 62–63, 177.) Rank appears to have been unaware of this insofar as he denied that lead employees ever fill-in for other employees during breaks, and asserted that production lines are, instead, "staffed with" "relief operators" who fill-in during breaks. (Tr. 153–154.)

As set-forth above, the corporate policy relaxes the prohibition slightly by stating that it applies to cell phones "except for those which are company issued or approved." The record did not show how often the Respondent "issued or approved" cell phones for use by rank-in-file employees. Neither Rank, nor any other witness, stated whether, or on what basis, the Respondent believed that an employee's possession of a company approved or issued cell phone would not pose the same risks of contamination and injury that were posed by an employee's possession of a personal cell phone.

Heinsohn testified that at all times when employees are physically present on the production line they are expected to be working and are considered to be on "working time." (Tr. 63.) They cannot leave the line for breaks unless they are relieved. Rank also stated that the employees take their breaks in facility break rooms that are not part of the manufacturing floor. Ibid.

B. The Complaint Allegations

The Complaint alleges that the Respondent coerced employees in violation of Section 8(a)(1) of the Act on May 13, 2016, when Heinsohn interrogated employees about their concerted activities, and on May 16 and 17, 2016, when Vanley interrogated employees about their concerted activities. In addition, the complaint alleges that the Respondent violated Section 8(a)(1) by maintaining overly broad rules that prohibit employees from possessing personal cell phones on the manufacturing floor or at their workstations.

III. ANALYSIS

A. Interrogations

1. Questioning by Heinsohn on May 13

On May 13, after Heinsohn learned that, earlier that day, employees had submitted a petition to the Respondent and discussed a work stoppage among themselves, he questioned four of the employees who signed the petition—Arellano, Dudley, Lopez, and Maltarich—in his office and asked each to prepare a written statement. The General Counsel alleges that Heinsohn's actions coerced the employees' exercise of their Section 7 right to collective action and violated Section 8(a)(1).[8] The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 30 (2016), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017); *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in

[7] In its Brief the Respondent exaggerates the difference in risk presented by allowing all employees on the manufacturing floor to carry cell phones as opposed to just allowing the line leads and management employees to do so. It asserts that "At any given time only about three management individuals are on the manufacturing floor carrying cellular phones, compared to 190 total employees." R. Br. at 10. The evidence shows, however, that only 50 employees work in the Respondent's production operation (Tr. 74), and that "at any given time" at most 16 to 24 of those—four to six on each of four lines—are on-duty on the production lines (Tr. 62.) Even that figure overstates the number of regular employees on the production floor at any given time because not all four lines operate on every shift. (Tr. 61.) Similarly, the Respondent's claim that it only permits three persons to have cell phones on the production floor at any given time is dubious since it takes account of only three line leads, not of the other supervisors and managers—e.g., Heinsohn (a process leader), Bond (a process leader), and Owens (production manager—who its policy allows to possess personal cell phones while in the production area. Nor does it account for the fourth line lead who would be present if all four lines were operating.

[8] Section 7 states that employees have the right to, inter alia, "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. Sec. 157. Section 8(a)(1) makes it unlawful for "an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. Sec. 158(a)(1).

part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Factors the Board has recognized as bearing on this question include: whether the interrogated employee was an open or active union supporter; whether proper assurances were given concerning the questioning; the background and timing of the interrogation; the nature of the information sought; the identity of the questioner; and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "In the final analysis," the Board has stated, the "task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000); see also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The circumstances in this case overwhelmingly favor finding that Heinsohn's questioning would reasonably tend to intimidate and coerce employees in the exercise of their Section 7 rights. According to Heinsohn's own contemporaneous written account, his questions were directed at finding out who had started the employees' discussions about a collective work stoppage and what the employees had said.[9] Employees engage in protected concerted activity when they discuss whether to engage in a work stoppage. See *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1255–1256 (2005), enfd. 183 Fed.Appx. 326 (4th Cir. 2006).[10] Heinsohn's efforts to flush out information about the employees' protected discussions, and in particular about who had initiated those discussions, would reasonably lead employees to worry that the Respondent intended to single out employees who instigate collective work action. Indeed, by the time of these interviews, the Respondent had already ejected Kelly from the facility. It is not surprising, and quite revealing, that Maltarich responded to Heinsohn's questioning by saying that she did not want to get anyone "in trouble." In *Sunrise Senior Living*, the Board affirmed a finding that an interrogation was unlawful where, as here, the questioning sought to get "interviewees to unmask the person or persons behind the petition and the work stoppage discussions." 344 NLRB at 1255.

In addition, it is notable that three of the four employees questioned by Heinsohn had not previously revealed anything to the Respondent about a potential work stoppage or their discussions with other employees on that subject. Cf. *Stoody Co.*, 320 NLRB at 18–19 (factors bearing on whether interrogation was coercive include whether interviewees were active and open in their support for the union). The only one of the four who the record shows revealed this to the Respondent was Dudley—an employee who had expressed fears to both the Respondent and Kelly that participating in a work stoppage would put his job at risk and who rushed to inform the Respondent that employees were discussing a stoppage. The fact that a number of the interviewees were not open about their discussions regarding a collective work action, weighs to some degree in favor of finding that they would have found it intimidating and coercive to be called away from their work duties and questioned by Heinsohn about that activity. See Medcare Associates, Inc., 330 NLRB at 939 (It increases the coercive nature of an interrogation if the "employee [is] called from work to the boss's office."). Heinsohn is not an upper level manager, but he was a level above the line lead employees who most directly oversee the employees on the line. In addition, the employees would reasonably understand Heinsohn's involvement to mean that the Respondent was adopting an aggressive posture towards the work stoppage discussions since Heinsohn had been brought back to the facility at a time when he was not otherwise working to confront employees within hours of their work stoppage discussions. The fact that the Respondent had found out about the Section 7 discussions so shortly after those discussions occurred and acted so swiftly to interrogate employees and eject Kelly, would reasonably chill employees from engaging in such discussions.

I also note that there is no claim that Heinsohn mitigated the coercive nature of the interrogations by offering the employees assurances that the purpose of the inquiry was benign and that their responses would not result in discipline. This would have been especially important here in light of the Respondent's decision to eject Kelly from the facility for reasons related to the petition. The Board has repeatedly noted that an employer's failure to provide such assurances when questioning employees about their protected activities weighs in favor of finding such questioning unlawfully coercive. *North Memorial*, 364 NLRB No. 61, slip op. at 30; *Stoody Co.*, 320 NLRB at 18–19; *Rossmore House Hotel*, 269 NLRB at 1177–1178.

To the extent that there was some evidence that weighs against finding the interrogations coercive, that evidence does so only lightly. I considered that it appears Heinsohn did not press Maltarich to provide answers about the work stoppage discussions once Maltarich indicated an unwillingness to do so. I also considered that Dudley testified that during the questioning he felt comfortable and under no pressure. At the same time, however, the record shows that Dudley, both during his conversation with Kelly about the possible work stoppage and in written statements he provided to Heinsohn and Vanley, expressed concern that participating in a work stoppage would put his job at risk. After considering the totality of the circumstances, I find that the factors showing that the questioning was coercive easily outweigh the countervailing factors and that Heinsohn's questioning would reasonably tend to coerce employees and cause them to feel restrained in the exercise of their Section 7 rights.

For the reasons discussed above I find that the Respondent violated Section 8(a)(1) on May 13, 2016, when Heinsohn coercively interrogated employees about their Section 7 activities.

2. Questioning by Vanley on May 16 and 17.

I find that Vanley's interrogations of employees on May 16 and May 17 were also unlawfully coercive. As discussed in the fact section, a focus of this questioning was to flush out information about the employees' discussions regarding a possible

[9] As discussed in the statement of facts, the record establishes that his purpose was not to determine whether Kelly had circulated the petition during work time in violation of the solicitation policy.

[10] This is true even if actually engaging in the work action being discussed would not itself be protected activity. *Sunrise Senior Living*, 344 NLRB at 1255–1256.

group work stoppage, including information about the identity of the employee who had initiated those discussions or the petition. The questioning was carried out in a way that would reasonably tend to intimidate the employees who had participated in protected activity to address safety lapses at the facility. It was only the employees who had signed the petition that were summoned away from their work to the office of Vanley, a high level official at the facility, to be questioned about their protected activities.

The conclusion that Vanley's questioning would reasonably tend to discourage protected concerted activities is supported by the transcript of his interrogation of Kelly. During approximately 29 minutes of questioning, Vanley repeatedly criticized Kelly for choosing to address safety concerns by initiating an employee petition, rather than by individually taking his safety concerns up the chain of command or otherwise using processes preferred by the Respondent. Cf. *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) (an employer "may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process"), enfd. sub nom. *Nevada Service Employees Union Local 1107*, 358 Fed.Appx. 783 (9th Cir. 2009). Vanley's purported reason for the interview—i.e., to determine whether Kelly had solicited during employees' working time in violation of company policy—was barely touched upon during the interrogation of Kelly and was, at any rate, not in dispute. Rather Vanley devoted most of the 29 minutes to bullying Kelly to disavow, or apologize for, exercising his Section 7 right to collectively petition the employer.

The record does not indicate that Vanley provided any of the employees with assurances that the inquiry into their protected activities was benign or that their responses would not result in discipline. The transcript of Vanley's interrogation of Kelly shows that he did not provide such assurances to Kelly. Vanley's failure to mitigate the coercive interrogations by providing assurances weighs in favor of finding the interrogations unlawful. *North Memorial,* supra; *Stoody Co.*, supra; *Rossmore House Hotel*, supra. It is not surprising that, in the absence of such assurances and given the subject matter of the questioning, three of the employees signed statements in which they denied that they had been part of discussions about a work stoppage. To put it another way, not only were the interviewees not open and active about their participation in discussions regarding a collective work stoppage, but they concealed their participation. As the Board recognized in *Medcare Associates*, when employees feel compelled to respond to an employer's questions about their protected activity by untruthfully denying that activity, it suggests that the questioning reasonably tended to coerce the employee at whom it was directed so that he or she would feel restrained from exercising Section 7 rights. 330 NLRB at 939 and 940.

The Respondent violated Section 8(a)(1) on May 16 and 17, 2016, when Vanley coercively interrogated employees about their Section 7 activities.

B. Prohibition on Employees Possessing Cell Phones at Work

Employees have a Section 7 right to engage in photography and audio or video recording in the workplace for their mutual aid and protection provided that no overriding employer interest justifies prohibiting the activity. *Whole Foods,* 363 NLRB No. 87 slip op. at 3 (2016), enfd. __ Fed.Appx. __, 2017 WL 2374843 (2d. Cir. 2017); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip at 3–4 (2016), enfd. in relevant part 865 F.3d 265 (5th Cir. 2017); Rio *All-Suites Hotel & Casino*, 362 NLRB 1690, 1693 (2015). Photography and recording serves important Section 7 purposes. Such purposes include "documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums." *Whole Foods*, supra. As the Board has noted, the case law is "replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right." Id. To see how this might be the case, one need look no further than the coercive interrogation of Kelly. Vanley claimed that the purpose of that interrogation was to determine whether Kelly had solicited other employees during working time, but Kelly's covert recording of that interrogation made clear that most of it was directed at coercing Kelly not to address employee concerns through a collective petition. The General Counsel argues that the Respondent has infringed on its employees' right to engage in photography or recording for Section 7 purposes, and violated Section 8(a)(1), by maintaining a rule prohibiting employees from possessing cell phones and other portable electronic devices because that rule explicitly encompasses and/or would reasonably be construed to encompass, a prohibition on employees engaging in photography and recording in the workplace for Section 7 purposes. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2000).[11] For the reasons discussed below, I find that the General Counsel is correct, and that the Respondent's policy prohibiting the possession of personal cell phones unlawfully infringes on the Section 7 rights of its employees.

I find that the challenged prohibition on the possession of cell phones and electronic devices constitutes an explicit restriction on the type of employee activity recognized to be protected in *Whole Foods,* supra, *T-Mobile USA, Inc.*, supra, and *Rio All-Suites Hotel & Casino*, supra. Cell phones and electronic devices are the primary, if not exclusive, means by which employees engage in the type of photography and recording activity that the Board has held to be protected by Section 7. The Respondent does not identify any means of engaging in such activity that employees would be expected to have at their disposal without running afoul of the challenged policy. By prohibiting employees from possessing the means to engage in protected photography and recording activity, the Respondent necessarily and completely prohibits that activity. If anything the interference

[11] In the *Lutheran Heritage*, supra, the Board stated that a work rule violates Sec. 8(a)(1) if it: explicitly restricts protected activity; would reasonably be construed by employees to prohibit Section 7 activity; was promulgated in response to protected activity; or has been applied to restrict Section 7 activity. In this case the General Counsel alleges that the Respondent's policy either explicitly restricts, or would be reasonably construed as restricting, Sec. 7 activity. The General Counsel does not allege that the challenged policy was promulgated as a response to, or applied so as to target, employees' Sec. 7 activity.

represented by the Respondent's rule is more complete than would be the case if the rule simply prohibited photography and recording activity, since depriving employees of the equipment necessary for that activity forecloses the possibility that employees might choose to risk the consequences of violating the prohibition in circumstances where the Section 7 purpose is sufficiently compelling.[12] Given that the rule does not permit the possession of such equipment in the production and warehouse areas, the rule necessarily does not differentiate between uses that are protected by Section 7 and those that are unprotected, a circumstance that led the Board to find the prohibitions in *Whole Foods* and *T-Mobile*, unlawfully overbroad. *Whole Foods*, slip op. at 4, *T-Mobile*, slip op. at 4

The Respondent contends that even if its cell phone policy interferes with employees' exercise of Section 7 rights, the policy is justified by overriding employer interests. The Board's decisions in *T-Mobile USA, Inc.*, and *Rio All-Suites Hotel & Casino*, make clear that an employer relying on such an argument bears the burden of showing that the policy is narrowly tailored to address an overriding interest. 363 NLRB No. 171, slip op. at 4 (finding a violation where the employer's "proffered rationales cannot justify the rule's broad restriction that employees would reasonably read as prohibiting activity protected by Section 7"); 362 NLRB No. 190, slip op. at 4 (finding a violation where the Respondent failed to tie the "prohibition at issue here to any particularized interest"). The Respondent suggests that it has demonstrated that concerns about food contamination and employee safety constitute such overriding interests in this case.[13] Based on the record in this case, I find that while preventing contamination and maintaining safety are important objectives, the Respondent has not shown that its interference with Section 7 rights is narrowly tailored to address those objectives.

To support its contention that concerns about food contamination justify its cell phone and electronic device prohibition, the Respondent presented the testimony of Rank, its former senior director of quality. Rank testified that "hav[ing] a cell phone or something above the belt would allow a foreign material to be dropped in a container." However, even that testimony implicitly suggests that a narrower restriction would meet the Respondent's professed contamination concern. If the problem is the risk posed by an employee keeping a cell phone or electronic device "*above the belt*," then that concern could be addressed by a narrower restriction that requires employees to keep such devices in pants pockets or otherwise secured below the belt. Indeed, that is exactly what the Respondent does with respect to employees' possession of a range of other personal items that might contaminate product. The rule at the San Antonio facility allows employees to carry other "loose items" — including "pens, pencils, combs" — "in pants pockets or otherwise secured below the waist," but not in "shirt pockets." Similarly the corporate policy, while prohibiting employees from possessing cell phones, states that, with respect to other loose items, employees are only prohibited from carrying them "in shirt pockets, or any location above the waist that would allow them to fall into the product, food contact service, or food packaging materials." A cell phone/electronic device rule that, like the rule for other loose items, restricted employees from carrying cell phones and electronic devices in shirt pockets but permitted them to carry them secured below the waist, would interfere far less with Section 7 rights than does the cell phone ban, if it would interfere with those rights at all. The Respondent does not provide a reason, much less an overriding reason, why the narrower restriction that is applied to prevent contamination by personal items such as combs and pens would not suffice for employees' personal cell phones.

The Respondent's contention that its rule is narrowly tailored to address overriding concerns regarding contamination is further rebutted by the fact that the Respondent's rules permit line leads to carry and use personal cell phones while performing the same tasks as the production line employees who are prohibited from carrying them. The record shows that line leads at the San Antonio facility take over the tasks of production line employees when those employees go on lunch and other breaks. In attempting to justify the prohibition, Rank incorrectly asserted that line leads do not take over the duties of production line employees during their breaks. In addition, Rank suggested that concerns about permitting line leads to carry cell phones are outweighed by the countervailing interest in allowing those individuals "to communicate . . . to the outside world or to management." He did not claim, however, to have given any consideration to the fact that employees also have a significant countervailing interest—i.e., their interest in being free to engage in statutorily protected collective action by photographing or recording unsafe or otherwise problematic conditions and activity in the workplace. The Respondent's argument that its ban is justified by overriding contamination concerns is undercut still further by the fact that the corporate rule prohibits an employee's "personal" cell phone but permits employees to possess cell phones "which are company issued or approved." The Respondent did not present evidence or argument from which one could reasonably conclude that company issued or approved cell phones create less risk of contamination than do personal cell phones.

In reaching the conclusion that the Respondent's asserted concerns about food safety do not, in this case, constitute the sort of

[12] As discussed above, I find that the Respondent's policy explicitly prohibits Sec. 7 activity and therefore it is not necessary, under *Lutheran Heritage*, supra, to consider whether employees would reasonably construe the policy to prohibit Sec. 7 activity. See, supra, footnote 11. However, if I were not persuaded that the prohibition is properly characterized as an explicit restriction on Sec. 7 activity, I would find a violation because the prohibition would reasonably be understood by employees to restrict Sec. 7 activity. Indeed, it is hard to imagine how any reasonable employee could conclude that the Respondent's ban on possession of the means to engage in photography and recording activity did not prohibit them from photographing and recording for Sec. 7 purposes. See also *Whole Foods*, slip op. at 2 ("An employer rule is unlawfully overbroad 'when employees would reasonably interpret it to encompass protected activities.'"), quoting *Triple Play Sports Bar*, 361 NLRB 308, 313 (2014), enfd. 629 Fed.Appx. 33 (2d Cir. 2015).

[13] See also *Flagstaff Medical Center*, 357 NLRB 659 (2011) (Given the "weighty" privacy interest of hospital patients and the need to prevent wrongful disclosure of health information, employees would reasonably interpret the employer's limited restrictions on the use of electronic equipment and cameras as a means of protecting privacy and not as a prohibition on using such devices for protected activity.) review granted in part and enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

overriding interest that may justify otherwise unlawful interference with Section 7 activity, I considered the Respondent's argument that its facilities are subject to regulatory requirements imposed by the FDA. See 21 CFR Section 110 (2016). This argument would be more persuasive if the Respondent had shown that the prohibition on cell phones was specifically mandated by, or necessary to comply with, requirements imposed by the FDA.[14] However, the regulations identified by the Respondent, while requiring regulated entities to implement controls to protect food safety, make no mention of cell phones or electronic devices and do not state that those items are to be banned from all production and warehouse areas. Indeed, it is clear the Respondent's argument that the FDA prohibits the possession of cell phones on the manufacturing floor does not even convince the Respondent. As discussed earlier, the Respondent allows line leads and managers to possess cell phones and allows any employee to possess a cell phone as long as it is "company issued or approved."

The Respondent attempts to minimize the extent to which it is interfering with Section 7 activity, and to distinguish *Whole Foods*, supra, and *T-Mobile*, supra, by suggesting that the prohibition is limited to working time inasmuch as all employee time at their workstations is "working time." Even assuming that the prohibition would be permissible if limited in that manner, the Respondent's argument fails because its prohibition encompasses nonworking time. First, I note that the Respondent not only prohibits employees from possessing cell phones in their work areas but provides that cell phones are to be kept in lockers, except during "break periods in designated areas." The Respondent did not show that it has "designated" *any* areas at all where it permits employees to use cell phones while on breaks, and certainly has not shown that such areas include all the nonwork areas where an employee would lawfully be entitled to photograph or record for Section 7 purposes during non-work time. Second, the rule places no discernible limits on the Respondent's discretion to decide what areas, if any, are designated for cell phone use. The Board has held that an employer rule that requires an employee to obtain management's permission before recording for Section 7 purposes or engaging in other types of protected activity violates the Act. *Whole Foods*, supra; *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92 (2016), enfd. ___ Fed.Appx. ___, 20017 WL 3822921 (11th Cir. 2017); *General Electric, Co.*, 169 NLRB 1101, 1104 (1968), enfd. 411 F.2d 750 (9th Cir. 1969). The Respondent's rule limits employees' ability to engage in photography and recording activity to those instances in which the employer has granted permission by designating an area were such activity is allowed. Third, the record shows that not all the time that employees are in the production area is work-time. Rather the evidence suggests that employees begin their breaks at the production line, when the line lead relieves them. This means that there would be periods of time when employees are on break in the manufacturing area, but explicitly prohibited from possessing cell phones and electronic devices, at least for the portion of their break time it takes them to proceed to a "designated" area. Moreover, the Respondent did not show that employees assigned to the warehouse area are on "work-time" whenever they are in the warehouse.

The Respondent also claims that it has an overriding interest in banning cell phones and electronic devices because allowing employees to possess them in the production and warehouse areas – regardless of any restrictions placed on how employees carried those devices or when they could be used – would present unacceptable risks of injury to persons or property. This, it should be noted, is the only interest that appears to be asserted to justify the prohibition as it relates to the warehouse areas at the facility, since the Respondent presented no evidence that that the warehouse area had open containers or food processing surfaces that could be contaminated by personal items. The Respondent has not presented persuasive evidence for this purported safety interest. The record does not include a description of a single actual accident at the facility, much less of recurrent accidents attributable to employees being distracted by cell phones or similar items. Nor did the Respondent show that it took other steps—such as special training—to address the safety concerns that it claims are so substantial as to warrant a significant intrusion on employees' Section 7 fights. Instead, Rank endeavored to support the Respondent's purported safety concerns by noting that employees operate forklifts in the production and warehouse areas of the San Antonio facility. Tr. 148. However, the use of forklifts is ubiquitous in manufacturing and warehousing facilities. The Respondent did not provide a basis for believing that the use of this standard piece of equipment represents special risks at its facility that are so profound as to override the employees' Section 7 rights. It would seem that, under the Respondent's theory, safety concerns would override employees' Section 7 rights to engage in photography and recording activity at every production or warehousing facility that uses forklifts or similar equipment. Moreover, assuming that some type of restriction on cell phones is warranted to address safety concerns at the Respondent's facility, the Respondent has not shown that the complete prohibition it has imposed is narrowly tailored to the interest. The Respondent produced no credible evidence that a narrower restriction—for example, on the *use* of cell phones *while driving* a forklift—would not meet the Respondent's concerns without so thoroughly trammeling employees' rights under the Act to photograph and record for their mutual aid and protection.

Rank also expressed concern that harm could be caused if an employee did not react promptly to a problem because that employee was distracted by a cell phone. Once again, the Respondent did not describe a single actual accident of the type it asks me to conclude is sufficient to justify its prohibition of personal cell phones, nor did it show that it had any concerns in this regard that would not apply to every other employer with a production or warehousing operation. Finally, as with the Respondent's

[14] See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 143–144 (2002) ("'[T]he Board is obliged to take into account other "equally important Congressional objectives"'" when considering action that would "potentially trench upon federal statutes and policies unrelated to the N[ational]L[abor] R[elations]A[ct].") and *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.").

claims about contamination risk, I find that the cogency, and perhaps the sincerity, of its risk assessment is undercut by the fact that the cell phone policy provides that line leads are allowed to possess and even use cell phones while performing the same tasks as other employees and that any employee may possess a cell phone if it is company issued or approved. For these reasons, I find the Respondent has failed to show that it has an overriding safety interest that warrants upholding its intrusion on employees' Section 7 rights.

I find that the Respondent has violated Section 8(a)(1) by maintaining overly-broad rules that prohibit employees from having personal cell phones on the manufacturing floor or at their workstations.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

2. By coercively interrogating employees and by promulgating overly-broad rules prohibiting employees from possessing cell phones the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. The Respondent, by Darren Heinsohn, violated Section 8(a)(1) on May 13, 2016, by coercively interrogating employees about their Section 7 activities.

4. The Respondent, by Brian Vanley, violated Section 8(a)(1) on May 16 and 17, 2016, by coercively interrogating employees about their Section 7 activities.

The Respondent has violated Section 8(a)(1) by maintaining overly-broad rules that prohibit employees from having personal cell phones on the manufacturing floor or at their workstations.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The General Counsel asks that I order the notice in this case be posted not just at the Respondent's San Antonio facility, but at all of the Respondent's facilities nationwide. I find that it is appropriate under the circumstances present here to confine the posting remedy to the one facility about which specific evidence was presented at the hearing, i.e., to the San Antonio facility. The evidence does not show that circumstances at the Respondent's other facilities are sufficiently similar that an independent analysis of those circumstances is not warranted.[15] Moreover, the parameters of the policy regarding cell phone possession in this case are set by the combined action of one rule promulgated at the corporate-wide level and a second rule that was promulgated at the San Antonio facility. The latter rule was not shown to be in place at other facilities, and certainly not at *all* the Respondent's facilities. I am unable to conclude on the record here that the circumstances regarding facility-specific rules at other facilities would not mitigate the unlawful interference that the corporate-wide rule imposes under the circumstances shown at the San Antonio facility.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[16]

ORDER

The Respondent, Cott Beverages, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about employees' concerted activities for their mutual aid and protection.

(b) Maintaining any overly-broad policy prohibiting from possessing personal cell phones on the manufacturing floor and/or at their workstations.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its overly broad policy prohibiting employees from possessing personal cell phones on the manufacturing floor and/or at their workstations.

(b) Furnish employees with inserts for the current policies that (1) advise employees that the unlawful prohibition has been rescinded, or (2) provide the language of a lawful prohibition, or to the extent that that the Respondent has not already done so, publish and distribute revised policies that (1) do not contain the unlawful prohibition, or (2) provides the language of a lawful prohibition.

(c) Within 14 days after service by the Region, post at its facility in San Antonio, Texas, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the

[15] I considered that Rank, a manager at the corporate level, testified that the operations he described did not differ meaningfully from one facility to the next. However, I found him an unreliable witness in this regard. I note in particular that Rank testified that line lead employees did not fill-in for employees who work on the production line when they go on breaks, but the evidence showed that, at least at the San Antonio facility, line lead employees do exactly that.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2016.

Dated, Washington, D.C., September 12, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about employees' concerted activities for mutual aid and protection.

WE WILL NOT maintain an overly-broad policy prohibiting you from possessing personal cell phones on the manufacturing floor and/or at your workstation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the overly broad policy prohibiting you from possessing personal cell phones on the manufacturing floor and/or at your workstation.

WE WILL furnish you with inserts for the current policies that (1) advise that the unlawful prohibition has been rescinded, or (2) provide the language of a lawful prohibition, or to the extent that that we have not already done so, publish and distribute revised policies that (1) do not contain the unlawful prohibition, or (2) provide the language of a lawful prohibition.

COTT BEVERAGES INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-181144 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.